

In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

v.

HOMER G. JOHNSON,
Appellee.

APPELLANT'S PETITION FOR REHEARING

Upon Appeal from the District Court of the United
States for the District of Oregon.

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**PETITION FOR REHEARING ON BEHALF
OF THE UNITED STATES OF AMERICA**

COMES NOW the Appellant, the United States of America, before this Honorable Court and respectfully petitions the Court for a rehearing of this cause and for grounds thereof avers that the Circuit Court of Appeals for the Ninth Circuit in its opinion of February 15, 1946, committed errors in that the Court

misapprehended and overlooked assignment of error No. 1 in the said cause. In this prayer for rehearing the Appellant is mindful of the rules of this Court that its appearance shall be brief and not in repetition of contentions formerly submitted to the Court. The Appellant now prays the indulgence of the Court to be permitted to submit the following additional points and authorities which might have been of assistance to the Court had they been submitted in Appellant's original brief in this case. It is respectfully submitted that the following principles would bear upon the issues considered by the Court in its former opinion and that they were not brought to the attention of the Court for its assistance upon its former consideration of this cause.

POINT I

The opinion of this Court rendered in this cause controverts the principle that the District Courts shall only have concurrent jurisdiction with the Court of Claims when all of the claims do not exceed \$10,000.

STATEMENT OF THE CASE

The Appellee-Plaintiff was awarded damages growing out of a contract with the United States for the construction of some 16 miles of highway.

In the District Court the Appellee amended his complaint alleging damages in excess of \$14,000. His

claim was made up of eight different elements of damage. He gave proof on the total \$14,994.72 of damages.

The Appellee waived his right to recovery in excess of \$10,000 by only asking judgment for this amount.

Upon appeal to this court the judgment was affirmed.¹

The petition for rehearing is limited to one question:

*Did the District Court have jurisdiction within the meaning of the Tucker Act?*²

The United States may be sued only as it gives its statutory consent.³ The Tucker Act constitutes a waiver of government immunity to suit and gives the District Court sitting as a legislative court concurrent jurisdiction with the Court of Claims of all claims not exceeding \$10,000.00 against the United States.⁴

Statutes waiving sovereign immunity from suit are strictly construed.⁴ The Court of Claims is the proper court in which to present claims against the United States. However, Congress saw fit to permit recovery against the United States in a claimant's home district providing the claim did not exceed \$10,000. The District Court has no jurisdiction to deter-

¹*U. S. v. Homer G. Johnson*, #11,026, February 15, 1946.

²28 U.S.C.A., Sect. 41 (20).

³*U. S. v. Shaw*, 309 U. S. 495, 500, 501.

⁴*U. S. v. Sherwood*, 312 U. S. 584.

mine claims in excess of the statutory limitations. It has no discretion but to dismiss an action when the claim exceeds \$10,000.⁵

So, if a plaintiff presents a complaint and the items of claim exceed \$10,000, the District Court is without jurisdiction. The Appellee in the case before the court contends that by not asking judgment in more than the jurisdictional amount of \$10,000, the defect is cured.

The Appellee did not waive any specific item of claim nor was any particular item remitted or abated. The court heard evidence on the entire items of damage aggregating \$14,994.72. It was necessary for the court to pick such items as he felt the plaintiff was entitled to recover in reaching the judgment. The court was required to pass upon interchangeable items of claim aggregating over \$10,000. We contend the court was without jurisdiction to do this.

Upon appeal the Government was obliged to attack every item of claim, aggregating \$14,994.72.⁶ The very purpose of the Tucker Act was to require cases where Government must attack items of claim exceeding \$10,000 to be brought in the Court of Claims. Had there been a specific remission or abatement by the Appellee of some of the items, then there would have been no need to contest each item on appeal.

⁵*Franklin v. United States*, 308 U. S. 516; *Hammond-Knowlton v. United States*, 121 Fed. (2d) 192.

⁶*The Chickasaw Nation v. United States*, Supreme Court of U. S. #170.

It was further apparent from the statement of Appellee's counsel that his avowed purpose was not to reduce the aggregate claim but only the amount of the judgment.⁷

While it is true that the courts have previously sustained waivers in order to comply with jurisdictional amounts, these cases are different from the case at bar.

In the cases of *Hill v. United States*, 40 Fed. 441, and *W. E. Hedger Co. v. United States*, 42 Fed. (2d) 553, the waiver of remission was of a specific portion of the claim. In these two cases the Government was not obliged to attack claims in excess of \$10,000 on appeal. We believe a sharp distinction can be drawn between situations where specific portions of claims are waived so as to obtain jurisdiction and merely a waiver of judgment in excess of a certain amount.

A recent case, *McMichael v. United States*, 63 Fed. Sup. 598, illustrates to our minds, at least, the technical requirements that must be met in acquiring jurisdiction under the Tucker Act.

In *The Chickasaw Nation v. United States*, No. 170, October Term, 1945, the Court of Claims offset an amount of \$22,858.78 allowed by items of gratuity expenditures totaling \$69,920.39. In reversing this, the Supreme Court said, "Indian claimants desirous of challenging the allowed offsets on appeal must be prepared to attack all items which make up the fund,

⁷Tr. p. 305, Appellant's Brief, p. 13.

however much it may exceed their claims." The analogy to our case seems apparent.

For the reasons stated we are of the opinion that the District Court was without jurisdiction and should have dismissed the Appellee-Plaintiff's complaint. The Petition for Rehearing should be granted.

Respectfully submitted,

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J. ROBERT PATTERSON,
Assistant United States Attorney.

I hereby certify that in my opinion, as counsel herein, the grounds for the foregoing Petition are well founded in law and that the same is not interposed for delay and that it is proper to be presented and filed.

.....
Of Counsel for Appellant-Petitioner.

